

# THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT: NEGLIGENCE ACTIONS BY LONGSHOREMEN AGAINST SHIPOWNERS—A PROPOSED SOLUTION

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In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act of 1927.<sup>1</sup> As Congress recognized, amendments to the Act were "long overdue."<sup>2</sup> The Act, which had not been amended since 1961, had established maximum benefits at seventy dollars per week for a disabled worker.<sup>3</sup> By 1972, however, the average longshoreman's weekly salary had risen to over two hundred dollars.<sup>4</sup> In order to adequately protect the wage earner and his family from income loss during periods of disability, a substantial increase in benefits was necessary.<sup>5</sup>

Although stevedore-employer groups acknowledged this need to increase benefits,<sup>6</sup> they asserted that in order for such legislation to have their support a long line of Supreme Court decisions had to be

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<sup>1</sup> Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251 (codified at 33 U.S.C. 902-903, 905-910, 912-914, 917, 919, 921a, 923, 928, 933, 935, 939, 940, 944, and 948a (Supp. IV 1974)). The Act provides coverage for over 800,000 employees, only one-third of whom are longshoremen and harbor workers. The remainder are District of Columbia employees, civilian workers at military bases outside of the United States, employees within the scope of the Outer Continental Shelf Lands Act, and certain workers of nonappropriated fund instrumentalities of the Armed Forces. See Comment *The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. MIAMI L. REV. 94, 94-95 (1972). This article will be concerned only with the effect of the 1972 amendments upon longshoremen and harbor workers.

<sup>2</sup> H.R. REP. NO. 92-1441, 92d Cong., 2nd Sess. 1, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4700 [hereinafter cited as [1972] U.S. CODE CONG. & AD. NEWS].

<sup>3</sup> *Id.* When the Act was first enacted in 1927, compensation was fixed at two-thirds of a disabled employee's weekly wage but not exceeding \$25.00 per week. Act of March 4, 1927, ch. 509, § 6, 44 Stat. 1426. In 1948 the maximum weekly compensation recovery was increased to \$35.00. Act of June 24, 1948, ch. 623, § 1, 62 Stat. 602. In 1956 this amount was raised to \$54.00. Act of July 26, 1956, ch. 735, § 1, 70 Stat. 654. And in 1961, the last raise prior to the 1972 amendments, this weekly sum was increased to \$70.00. Act of July 14, 1961, Pub. L. No. 87-87, § 1, 75 Stat. 203 (amending 33 U.S.C. § 906 (1956)).

<sup>4</sup> [1972] U.S. CODE CONG. & AD. NEWS 4698.

<sup>5</sup> *Id.* at 4698-99.

<sup>6</sup> *Id.* at 4699.

modified.<sup>7</sup> Generally, these rulings held that under the doctrine of seaworthiness a shipowner warranted the safety of his vessel and was liable regardless of fault for injuries incurred by employees covered by the Act.<sup>8</sup> Further, a shipowner was able under the concept of indemnity to recover the damages for which he was liable to the injured employee from the stevedore-employer on theories of breach of express or implied warranty of workmanlike performance.<sup>9</sup>

Clearly, the stevedore-employer was in an unenviable position. He was not only subject to compensation payments based upon strict liability but he frequently was forced to reimburse the shipowner for damages paid to the longshoreman in a third-party action. The stevedore-employer was, however, entitled to a lien to the extent of compensation payments made on the recovery the employee received in the third-party action.<sup>10</sup> Nevertheless, the stevedore-employer felt—often with good reason—that he was bearing more than his fair share of the costs.<sup>11</sup>

Shipowners, on the other hand, feared that the abolition of their indemnity action against the stevedore-employers coupled with the preservation of the seaworthiness doctrine would subject them to severe liability.<sup>12</sup> They were therefore in favor of prohibiting third-party actions altogether.<sup>13</sup> Realizing that Congress was not likely to immunize them from third-party suits under all circumstances, the shipowners consented to a provision that would subject them to liability to an injured longshoreman only if the injury were caused by the shipowner's negligence.<sup>14</sup>

Thus, in enacting the 1972 amendments Congress was concerned with achieving the following goals: (1) the implementation of a com-

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<sup>7</sup> *Id.*

<sup>8</sup> *E.g.*, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). *See* text accompanying notes 17-19 *infra*.

<sup>9</sup> *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). *See* text accompanying notes 30-32 *infra*.

<sup>10</sup> 33 U.S.C. § 933 (1970); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). *See* text accompanying notes 26-29 *infra*.

<sup>11</sup> *See* [1972] U.S. CODE CONG. & AD. NEWS 4701-03. As stated in the House Report, prior to the 1972 amendments, "the end result [was] that, despite the provision in the Act which limit[ed] an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer [was] indirectly liable for damages to an injured longshoreman who utilize[d] the technique of suing the vessel under the unseaworthiness doctrine." *Id.* at 4702.

<sup>12</sup> *See Senate Hearings, Subcommittee on Labor and Public Welfare*, 92d Cong., 2d Sess. 270-74 (1972), excerpted in *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 769-72 (E.D. Pa. 1974).

<sup>13</sup> Mr Scanlon, a representative speaking in behalf of the shipowners, remarked: "We think, Mr. Chairman, that all cases against the shipowner . . . should be eliminated; and the reason for that is, it is awfully difficult to try to limit negligence cases with respect to a shipowner where you have the maritime law such as it is." 379 F. Supp. at 772.

<sup>14</sup> *Id.*

pensation payment scheme that would increase longshoremen's benefits to a level commensurate with present-day realities; (2) the elimination of the concepts of seaworthiness and indemnity; (3) the establishment of a third-party action allowing the longshoreman to sue the shipowner for negligence; and (4) the limitation that the stevedore-employer would not be liable directly or indirectly for any damages recovered against the shipowner in a negligence action.<sup>15</sup> In an effort to secure the latter three interests Congress enacted 33 U.S.C. § 905(b), which provides:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Unfortunately, Congress' enactment of the above statute left unresolved many of the perplexing questions that were before it. Rather than clearly enunciating the answers to these issues, this inartfully drawn provision has left both the courts and commentators with no other alternative but to speculate about its meaning. This confusion is centered around the situation in which the longshoreman sustains an injury due to the negligence of both the stevedore-employer and the shipowner. In such a case, is the longshoreman entitled to recover the full amount of his damages in a negligence action against the shipowner? If the shipowner is sued by the longshoreman in a third-party action and loses, is the shipowner entitled to contribution against the concurrently negligent stevedore-employer? If the stevedore-employer is concurrently negligent in causing the longshoreman's injury, is he nevertheless allowed a lien upon the plain-

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<sup>15</sup> See [1972] U.S. CODE CONG. & AD. NEWS 4700-05.

tiff's judgment to recover past compensation payments?

The purpose of this article is to examine these troublesome questions. It must be emphasized that, due to the ambiguities of § 905(b) and its legislative history, the answers are by no means clear. To provide some guidance in this difficult area, this article first will discuss the relevant Supreme Court rulings prior to the 1972 amendments. Thereafter, the applicable judicial decisions that have considered these issues since the enactment of § 905(b) will be examined. Finally, the article will analyze how the Supreme Court should resolve these questions if and when the Court determines it proper to confront them.

## I. SUPREME COURT DECISIONS PRIOR TO THE 1972 AMENDMENTS

Rather than supply an exhaustive critique of Supreme Court decisions prior to the 1972 amendments, this section will concentrate on those holdings that had the greatest impact in prompting Congress to enact the amendments, particularly § 905(b).<sup>16</sup> Also, those Supreme Court rulings that arguably have survived the 1972 amendments and that have great significance for the issues raised later in this article will be discussed.

In 1946 the Supreme Court decided *Seas Shipping Co. v. Sieracki*,<sup>17</sup> which extended the traditional seaman's remedy, founded on the breach of the shipowner's absolute nondelegable obligation to provide a seaworthy vessel, to longshoremen.<sup>18</sup> The basis for affording the longshoreman this seaworthiness cause of action was the Court's belief that "he [was] doing a seaman's work and incurring a seaman's hazards."<sup>19</sup>

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<sup>16</sup> For law review articles that discuss the 1972 amendments from a general perspective, see Comment, *The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. MIAMI L. REV. 94 (1972); Note, *Admiralty—Maritime Personal Injury and Death—Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972*, 47 TULANE L. REV. 1151 (1973); Note, *Maritime Jurisdiction and Longshoremen's Remedies*, 1973 WASH. U.L.Q. 649.

<sup>17</sup> 328 U.S. 85 (1946).

<sup>18</sup> Prior to *Sieracki*, the seaworthiness remedy was afforded only to seamen. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96 (1944); *The Osceola*, 189 U.S. 158 (1903). It must be emphasized that this doctrine imposes absolute liability upon the shipowner. As defined by the *Sieracki* Court, this form of liability

is essentially . . . without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character . . . . It is a form of absolute duty owing to all within the range of its humanitarian policy.

328 U.S. at 94-95 (footnotes omitted).

<sup>19</sup> 328 U.S. at 99.

The obvious result of *Sieracki* was that the vessel owners were subject to an increasing number of damage suits. Because these third-party actions greatly burdened their financial resources, shipowners attempted to shift part or all of these costs to the stevedore-employer.<sup>20</sup> The vessel owners' initial effort to secure this result was in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*<sup>21</sup> In that case the jury found that the plaintiff's injury was due seventy-five percent to the stevedore-employer's negligence and twenty-five percent to the shipowner's negligence. The vessel owner argued that for this reason the employer should be required to make contribution.<sup>22</sup> In pertinent part, § 905(a) of the Act, both at the time of *Halycon* and after the 1972 amendments, stated that the stevedore-employer's duty to provide compensation benefits to an injured employee was to "be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ." <sup>23</sup> In spite of this language, the shipowner contended that the exclusivity provision did not apply to him. The *Halycon* Court did not reach this question. Rather, it first recognized that it had never expressly extended the doctrine of contribution to noncollision cases.<sup>24</sup> The Court then concluded that under the circumstances present in such a situation, "it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action."<sup>25</sup>

The shipowner in *Pope & Talbot, Inc. v. Hawn*<sup>26</sup> pursued another approach. He argued that since the stevedore-employer had negligently contributed to the plaintiff's injuries, the judgment against him should be reduced by the amount of compensation payments that the employee had received from the employer. Directly confronting this assertion, the Court rejected it.<sup>27</sup> First, the Court

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<sup>20</sup> See Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation*, 19 N.Y.L.F. 587, 590-91 (1974).

<sup>21</sup> 342 U.S. 282 (1952).

<sup>22</sup> *Id.* at 283-84. Prior to *Halcyon*, the federal circuits had been divided as to whether contribution was permissible in this situation. Compare *United States v. Rothschild Int'l Stevedoring Co.*, 183 F.2d 181 (9th Cir. 1950), with *American Mut. Ins. Co. v. Mathews*, 182 F.2d 322 (2d Cir. 1950).

<sup>23</sup> Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 5, 44 Stat. 1426 (1927) (current version at 33 U.S.C. § 905(a) (Supp. IV 1974)) (emphasis added).

<sup>24</sup> 342 U.S. at 284.

<sup>25</sup> *Id.* at 285.

<sup>26</sup> 346 U.S. 406 (1953).

<sup>27</sup> *Id.* at 411-12. In addition, the longshoreman was contributorily negligent in causing his own injuries. Based on this negligence, the shipowner argued that the plaintiff's conduct should act as a complete bar to his recovery. The Supreme Court disagreed, holding that the longshore-

noted that § 933 contained at that time (and after the 1972 amendments) specific provisions authorizing the stevedore-employer to recover his compensation payments out of any damages award from a third party who had negligently caused the employee's injuries. If the shipowner's contention were accepted, the Court concluded, it would frustrate the purpose of § 933 of protecting employers who were absolutely liable under that Act.<sup>28</sup> As importantly, the Court held that reduction of the shipowner's liability at the expense of the employer "would be the substantial equivalent of contribution which we declined to require in the *Halycon* case."<sup>29</sup>

After the Court's decisions in *Halcyon* and *Pope & Talbot*, the shipowner was left with one last alternative to save himself from ultimate financial liability under the seaworthiness doctrine. That alternative was based on the concept of indemnity. In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,<sup>30</sup> the Court adopted the shipowner's argument that since a suit to recover indemnity was not brought "on account of such injury" to the longshoreman, it was therefore not barred by the exclusivity provision of § 905(a).<sup>31</sup> The Court reasoned that the shipowner's indemnity claim arose out of the stevedore-employer's breach of an implied warranty of workmanlike performance.<sup>32</sup> By the late 1960's, further extensions of *Ryan* made clear that despite § 905(a), which purportedly limited the stevedore-employer's liability to the compensation and medical payments provided by the Act, the employer was in fact solely liable for all damages recovered by his injured employee.<sup>33</sup>

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man's negligence may, at most, mitigate his recovery. In rejecting the shipowner's argument, the Court reflected:

The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.

*Id.* at 408-09. The 1972 amendments do not change this rule authorizing comparative negligence. See note 42 *infra*.

<sup>28</sup> 346 U.S. at 412.

<sup>29</sup> *Id.*

<sup>30</sup> 350 U.S. 124 (1956).

<sup>31</sup> *Id.* at 130.

<sup>32</sup> *Id.* at 128-34. For cases decided after the 1972 amendments which discuss *Ryan*, see *Cella v. Partenreederei M.S. Ravenna*, 529 F.2d 15, 19 (1st Cir. 1975), *cert. denied*, 44 U.S.L.W. 3659 (1976); *Brkaric v. Star Iron & Steel Co.*, 409 F. Supp. 516, 519 (E.D. N.Y. 1976); *Slaughter v. S.S. Ronde Fyffes Group*, 390 F. Supp. 637, 638-39 (S.D. Ga. 1974), *aff'd*, 509 F.2d 973 (5th Cir. 1975); *Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 649 (N.D. Cal. 1974). See also *Bess v. Agromar Line*, 518 F.2d 738, 740-43 (4th Cir. 1975).

<sup>33</sup> See, e.g., *Italia Societa per Anzioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *McLaughlin v. Trelleborgs Angfartygs A/B*, 408 F.2d 1334 (2d Cir. 1969), *cert. denied*, 395 U.S. 946 (1969).

Thus, by its decisions in *Sieracki* and *Ryan*, the Court provided longshoremen with third-party actions against vessel owners under the seaworthiness doctrine and then transferred the ultimate liability for these damages to the stevedore-employers. The Court had engaged in judicial legislation at its outermost extreme. Dissatisfied with the compensation system and its attending obsolete benefits, the Court felt that justice demanded that it act, for it appeared that Congress was not about to remedy the situation.<sup>34</sup> This humanitarian philosophy manifested itself in providing the longshoreman with a third-party suit and placing the burden of these costs on the party who was best able to bear them—the stevedore-employer.<sup>35</sup>

With the increasing number of third-party actions prompted by the *Sieracki* and *Ryan* holdings, shipowners and stevedore-employers were compelled to devote an increasing proportion of their financial resources to pay these successful claimants and to defray litigation expenses.<sup>36</sup> Arguing that remedial congressional legislation would permit them to pay higher compensation awards, the stevedore-employers called for legislative action.<sup>37</sup> In 1972 Congress responded by enacting the amendments to the Longshoremen's and Harbor Workers' Compensation Act.

## II. JUDICIAL DECISIONS AFTER THE 1972 AMENDMENTS

In enacting § 905(b), Congress sought to permit a longshoreman to bring a third-party suit against the shipowner for negligence only, rather than for unseaworthiness, and also sought to ensure that the longshoreman's employer would not be held liable for any damages recovered in such an action.<sup>38</sup> Unfortunately, much controversy has

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<sup>34</sup> See Comment, *Negligence Standards Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints*, 21 VILL. L. REV. 244, 250-51 (1976). See also Note, *Risk Distribution and Seaworthiness*, 75 YALE L.J. 1174, 1184-85 (1966).

<sup>35</sup> See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 108 (1946) (Frankfurter, J., dissenting), in which Justice Frankfurter stated:

The whole philosophy of liability without fault is that losses which are incidental to socially desirable conduct should be placed on those best able to bear them. *Congress had made a determination that the employer is best able to bear the loss* which, in this instance, could not be avoided by the exercise of due care. This is an implied determination which should preclude us from saying that the ship owner is in a more favorable position to absorb the loss or to pass it on to society at large, than the employer.

*Id.* at 108 (emphasis added).

<sup>36</sup> See [1972] U.S. CODE CONG. & AD. NEWS 4702.

<sup>37</sup> *Id.* at 4698-99.

<sup>38</sup> *Id.* at 4704. The House Report provides:

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can

arisen about cases in which the longshoreman's injuries are caused by the negligence of both the shipowner and the stevedore-employer. As noted earlier in this article, three basic questions must be confronted in this situation: (1) Is the employee entitled to recover the full amount of his damages in a negligence action against the shipowner? (2) If the employee recovers damages in a third-party action against the shipowner, is the shipowner entitled to contribution against the concurrently negligent stevedore-employer? (3) If the employer is concurrently negligent in causing the employee's injury, is he nevertheless allowed a lien upon the plaintiff's judgment to recover past compensation payments? The courts, in considering these questions since the 1972 amendments, have split into three different camps. In this section each of these views will be examined. Later in this article an attempt will be made to determine which approach is the correct one.

#### A. *The Majority View*

The prevailing view is that an employee is allowed to recover his full damages against the negligent shipowner, that contribution against the stevedore-employer is impermissible, and that, even though concurrently negligent, the employer is entitled to recoup his compensation payments in full. The leading cases representing this approach are two companion cases decided by the Ninth Circuit in the latter part of 1975. In *Dodge v. Mitsui Shintaku Ginko K. K. Tokyo*<sup>39</sup> the shipowner and stevedore-employer were found to be equally negligent in causing the longshoreman's injury.<sup>40</sup> In *Shellman v. United States Lines, Inc.*,<sup>41</sup> the employer was found to be seventy percent negligent and the vessel owner thirty percent negligent in causing the injury.<sup>42</sup>

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show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

<sup>39</sup> 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976), *aff'g* 1975 A.M.C. 1505 (D. Ore. 1974).

<sup>40</sup> 528 F.2d at 670.

<sup>41</sup> 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976), *rev'g* 1975 A.M.C. 362 (C.D. Cal. 1974). The district court decision is discussed later in this article. See text accompanying notes 75-82 *infra*.

<sup>42</sup> 528 F.2d at 676. In *Shellman* the court emphasized that the longshoreman was not contributorily negligent. If he were, the less harsh doctrine of comparative negligence would



On the contribution issue, the court noted in *Dodge* and in a footnote in *Shellman*<sup>43</sup> that the facts of those cases were similar to those presented before the Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.* Since the *Halcyon* Court denied a right of contribution to the shipowner, the Ninth Circuit concluded, *Halcyon* was controlling on the contribution issue unless that decision had been modified by later Supreme Court authority or the 1972 amendments.<sup>44</sup> Upon examining the relevant authorities, the court concluded that *Halcyon* was still good law, and hence contribution was disallowed.<sup>45</sup>

On the question whether the court should deny the stevedore-employer a lien upon the longshoreman's judgment because he had been concurrently negligent, the Ninth Circuit was faced with the question whether the Supreme Court's holding in *Pope & Talbot, Inc. v. Hawk*<sup>46</sup> was still controlling or had been modified by later authority. In accord with its analysis of the *Halcyon* issue, the court held that *Pope & Talbot* was binding.<sup>47</sup> Relying on the high Court's language in that case, the Ninth Circuit concluded that "the reduction of the stevedore's recovery would be another form of contribution which the Act seeks to prohibit."<sup>48</sup> In an accompanying footnote, however, the court emphasized that it had reached its conclusion not necessarily because of the fairness of that approach but because it was obligated to do so by controlling Supreme Court authority:

It is indeed questionable whether it is equitable for the stevedore employer to recover the full amount of its compensation payments even if its negligence were a concurring cause of the longshoreman's injuries. The issue before us, however, is not whether *Halcyon* and *Pope & Talbot* were correctly decided. Rather, because these decisions are still good law, our obligation is to apply the principles of those cases to the facts presently before us.<sup>49</sup>

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apply. *Id.* at 676-77 n.1. As stated in the House Report, "the committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury." [1972] U.S. CODE CONG. & AD. NEWS 4705. See note 27 *supra*.

<sup>43</sup> 528 F.2d at 670; 528 F.2d at 678-79 n.2.

<sup>44</sup> 528 F.2d at 670; 528 F.2d at 679 n.2.

<sup>45</sup> 528 F.2d at 671; 528 F.2d at 679 n.2.

<sup>46</sup> 346 U.S. 406 (1953).

<sup>47</sup> 528 F.2d at 673; 528 F.2d at 679 n.2.

<sup>48</sup> 528 F.2d at 673. In *Shellman* the court phrased this conclusion in slightly different terms: "Contribution is still prohibited and any indirect method to accomplish the same result is also prohibited." 528 F.2d at 679 n.2.

<sup>49</sup> 528 F.2d at 673 n.1.

Turning next to the question whether the longshoreman should be entitled to recover his full damages from the shipowner, the court decided to adopt the prevailing view in favor of recovery for the reason that the minority rationales imposed "unjustified burdens upon the injured longshoreman."<sup>50</sup> In so holding, the court particularly relied upon district court decisions within that circuit which also had preferred the majority view. Quoting a district court ruling from Oregon,<sup>51</sup> the court observed that the cases before it were instances of concurring negligence which, under traditional negligence principles, entitled the employee to recover his full damages from the negligent vessel owner.<sup>52</sup> Turning to a Washington case,<sup>53</sup> the court noted that, although it may appear inequitable for a shipowner to be liable to the longshoreman for all of his damages in such a situation, it must be remembered that reducing the employee's recovery would not eliminate the inequity. The longshoreman "would be restricted in his recovery as against the shipowner without acquiring any offsetting rights under the Act as against his stevedore employer."<sup>54</sup> On this basis, the court held that the longshoreman could recover his full damages from the shipowner.<sup>55</sup> In conclusion the court stated that "it is for Congress and not for the courts to create a solution to this problem."<sup>56</sup>

The Second Circuit has also adopted the majority view. In *Landon v. Lief Hoegh and Co.*<sup>57</sup> the injured longshoreman brought a negligence action against the shipowner.<sup>58</sup> The shipowner thereupon

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<sup>50</sup> 528 F.2d at 672; 528 F.2d at 680. See *Santino v. Liberian Distance Transports, Inc.*, 405 F. Supp. 34, 35 (W.D. Wash. 1975); *Solsvik v. Maremar Compania Naviera*, 399 F. Supp. 712, 714 (W.D. Wash. 1975).

<sup>51</sup> *Hubbard v. Great Pac. Shipping Co.*, 404 F. Supp. 1242 (D. Ore. 1975).

<sup>52</sup> 528 F.2d at 679-80, 528 F.2d at 672 (quoting 404 F. Supp. at 1244). Hence, "because the shipowner's negligence was a concurring cause in producing the longshoreman's injuries, the shipowner is liable for the total of the plaintiff's damages." 528 F.2d at 680.

<sup>53</sup> *Santino v. Liberian Distance Transports, Inc.*, 405 F. Supp. 34 (W.D. Wash. 1975).

<sup>54</sup> 528 F.2d at 672, 528 F.2d at 680 (quoting 405 F. Supp. at 35).

<sup>55</sup> 528 F.2d at 673; 528 F.2d at 680.

<sup>56</sup> 528 F.2d at 673; 528 F.2d at 681. The *Dodge* and *Shellman* decisions are supported by the well-reasoned opinion in *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402 (E.D. La. 1974). Also, the First Circuit, recently reflecting on *Dodge* and *Shellman*, stated: "Under recent decisions, the stevedore receives full reimbursement of its compensation payments even if it was currently [sic] negligent in causing the longshoreman's injuries . . . and cannot otherwise be compelled to contribute to the longshoreman's recovery." *Cella v. Partenreederei M.S. Ravenna*, 529 F.2d 15, 20 (1st Cir. 1975), *cert. denied*, 44 U.S.L.W. 3659 (1976) (footnotes omitted). The Ninth Circuit's decisions in *Dodge* and *Shellman* were sharply criticized by Coleman & Daly, *Equitable Credit: Apportionment of Damages According To Fault in Tripartite Litigation under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 35 MD. L. REV. 351, 412-13 (1976).

<sup>57</sup> 386 F. Supp. 1081 (E.D. N.Y. 1974), *aff'd*, 521 F.2d 756 (2d Cir. 1975).

<sup>58</sup> 386 F. Supp. at 1082.

moved to join the stevedoring contractor and its compensation carrier. The district judge denied the motion, holding that the stevedore and its carrier were liable only to the extent of compensation payments to be made under the Act.<sup>59</sup> On appeal the Second Circuit affirmed. Agreeing with the Ninth Circuit's reasoning, the court held that both *Halcyon* and *Pope & Talbot* were still good law.<sup>60</sup> Hence, under controlling Supreme Court authority, the shipowner was not entitled to reduce his damages to the longshoreman by the amount of compensation payments made by the employer.<sup>61</sup> The shipowner in *Landon* also argued that the 1972 amendments should be interpreted in such a manner that the employee could recover in a third-party suit only if his injury was incurred solely through the negligence of the shipowner without any concurring negligence on the part of the stevedore-employer. Upon examining the amendments, the Second Circuit found this contention to be wholly without merit: "We cannot agree that some negligence by the employer is enough to cut off the injured longshoreman's protected right to sue the ship for its own negligence."<sup>62</sup>

The major district court decision adhering to the prevailing view was rendered by a three-judge court in the Third Circuit.<sup>63</sup> After an exhaustive treatment of the relevant Supreme Court cases and the legislative history of the 1972 amendments,<sup>64</sup> the court concluded that

<sup>59</sup> *Id.* at 1084. *Accord*, *Davillier v. Cavn Venezuelan Line*, 407 F. Supp. 1234, 1236-38 (E.D. La. 1976).

<sup>60</sup> 521 F.2d at 760. The decision in *Landon* was rendered prior to *Dodge* and *Shellman*.

<sup>61</sup> *Id.* at 763.

<sup>62</sup> *Id.* The Second Circuit remarked that if Congress had intended that the shipowner be held liable only when his negligence was the sole cause in producing the longshoremen's injury, it could have inserted the word "sole" within § 905(b), so that the provision would have read "caused by the 'sole' negligence of the vessel." *Id.* In regard to this issue in the district court, the trial judge stated:

Was Section 905(b) meant, in exchange for abolishing the unseaworthiness ground of liability, to abolish every sort of right to pass on some or all of the shipowner's liability to the longshoreman to the employer? Even if that meant that a trivial, but legally sufficient amount of negligence toward the longshoreman would enable the employer to off-load to the shipowner his entire liability under the Act even though the employer's negligence was the most significant proximate cause of the accident, and the employer was in breach of duties that he owed to the shipowner in respect of the accident and damage?

The language of Section 905(b) leaves no room for escape from the conclusion that the section means exactly that sweeping and painful result. The examination of the background and history of the legislative change . . . confirms the conclusion. 386 F. Supp. at 1084 (citations omitted). *See also* *Galimi v. Jetco, Inc.*, 514 F.2d 949, 954-56 (2d Cir. 1975); *Smith v. Rivest*, 396 F. Supp. 379, 383 (D. Wis. 1975).

<sup>63</sup> *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974). A panel of three district judges was convened in *Lucas* and its accompanying cases because of the large number of cases pending in that district which raised identical issues. *Id.* at 760.

<sup>64</sup> *Id.* at 761-68.

the stevedore-employer's liability under the Act was limited to compensation payments.<sup>65</sup> It further held that the longshoreman could sue the shipowner for his full damages in a negligence action even though the stevedore-employer had been concurrently negligent.<sup>66</sup> The court recognized that its ruling left the shipowner in an unenviable position. But, like other tribunals adopting the prevailing view, the court viewed its holding as the only available alternative. Otherwise,

The various methods proposed by the vessel owners to shift their tort liability would cause a disruption in the scheme provided by Congress. To this extent the wisdom of the *Halcyon* case endures. It is for Congress to provide the proper balance. Courts' sense of fairness can only prove disruptive of that balance.<sup>67</sup>

Thus the courts representing the majority view have accepted this approach, not necessarily because it furthers the interests of justice, but because they have felt themselves bound by controlling authority. According to these courts, if this inequitable situation is to be remedied, the cure must be advanced by the Supreme Court or Congress; until then, judicial activism in this sensitive area can only complicate the problem rather than alleviate it.<sup>68</sup>

#### B. *The Equitable Credit—Shellman Doctrine*

In a 1974 law review article, Cohen and Dougherty proposed new criteria which they believed would guarantee equitable uniformity in tripartite litigation under the 1972 amendments.<sup>69</sup> Their approach has been supported in a well-researched work recently published by Coleman and Daly.<sup>70</sup> In addition, at least three district courts have been persuaded by the soundness of this approach.<sup>71</sup> Other courts, particularly the Second and Ninth Circuits, while aware of the arguments advanced in support of this view, have rejected it.<sup>72</sup>

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<sup>65</sup> *Id.* at 768-69.

<sup>66</sup> *Id.* at 769.

<sup>67</sup> *Id.*

<sup>68</sup> See *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 680-81 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976); *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 673 n.1 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976); *Solsvik v. Maremar Compania Naviera*, 399 F. Supp. 712, 714 (W.D. Wash. 1975); *Landon v. Lief Hoegh & Co.*, 386 F. Supp. 1081, 1084 (E.D. N.Y. 1974), *aff'd*, 521 F.2d 756 (2d Cir. 1975).

<sup>69</sup> Cohen & Dougherty, *supra* note 20.

<sup>70</sup> Coleman and Daly, *supra* note 56.

<sup>71</sup> *Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, 398 F. Supp. 1224 (D. Ore. 1975); *Frasca v. Prudential-Grace Lines, Inc.*, 1975 A.M.C. 1143, *judgment n.o.v.*, 394 F. Supp. 1092 (D. Md. 1975); *Shellman v. United States Lines, Inc.*, 1975 A.M.C. 362 (C.D. Cal. 1974), *rev'd*, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976).

<sup>72</sup> See, e.g., *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 671-72 (9th Cir.

As proposed by Cohen and Dougherty and their supporters, the Equitable Credit Doctrine contains the following basic provisions:

[1] An employee injured in the course of his employment recovers workmen's compensation benefits from his employer, regardless of fault. If the injury was not contributed to by the negligence of any third party, he recovers nothing more than these compensation benefits.

[2] If the injury was caused by the fault of a third party, the employee may sue such third party for common law damages. His recovery is to be reduced to the extent of his own contributory negligence. And, if the employer was not also at fault, the full amount of all compensation benefits is to be deducted from the employee's recovery and paid to the employer in reimbursement.

[3] If the employer was a joint tortfeasor, it could be impleaded or otherwise bound by the third party. However, in such a case, the actual dollar liability of the employer should not exceed the amount of the employer's dollar liability in compensation. Just as every employee will be guaranteed minimum benefits of workmen's compensation, so will every employer be guaranteed a maximum liability of compensation benefits, whether directly or indirectly, for any employee's industrial accident.

The proportional amount of any employer's fault is to go in mitigation of the third party's damages, in the same fashion as the employee's contributory negligence, so that the third party actually responds to the employee only for that amount of the employee's damages as is equal to the third party's proportion of the fault.

[4] From any recovery the employee obtains from the third party, the employee is to reimburse the employer for the compensation benefits paid. However, if any employer negligence resulted in a diminution or reduction of the employee's recovery against the third party, the employee may deduct and retain that amount from the compensation benefits to be reimbursed.

Thus, if the damages attributable to the employer's fault were less than the amount of the compensation benefits, the employer would recover only the difference between the amount of the compensation benefits and the amount by which its fault reduced the employee's recovery. If the employer's fault were in excess of the compensation benefits, it would not receive any reimbursement, but neither would it be liable for any excess. In such situation the loss to the employee is the consideration for the absolute right to compensation benefits regardless of fault.<sup>73</sup>

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1975), *cert. denied*, 44 U.S.L.W. 3593 (1976); *Landon v. Lief Hoegh & Co.*, 521 F.2d 756, 763 (2d Cir. 1975).

<sup>73</sup> Cohen & Dougherty, *supra* note 20, at 606-07. See Coleman & Daly, *supra* note 56, at 355-57.

Upon examination, the third and fourth provisions are the heart of the doctrine, since they both concern the situation in which the shipowner and the stevedore-employer are concurrently negligent in causing the longshoreman's injury. Provision [3] stands for the principle that the negligent shipowner can be held liable only to the extent of his proportional fault. The second point advanced in that provision is that the negligent stevedore-employer's maximum liability cannot exceed the amount of compensation benefits he has paid under the Act. Provision [4] establishes criteria by which to determine what portion of his compensation payments, if any, the stevedore-employer or his insurer is entitled to recoup in various situations.<sup>74</sup>

The first district court to adopt the Equitable Credit Doctrine rendered its opinion in *Shellman v. United States Lines Operators, Inc.*,<sup>75</sup> which was subsequently reversed by the Ninth Circuit.<sup>76</sup> This decision, which also became known as the *Shellman* Doctrine, thoroughly traced the relevant Supreme Court holdings prior to the 1972 amendments.<sup>77</sup> Upon analysis, the court concluded that the amendments had not only modified *Sieracki* and *Ryan*, but *Halcyon* and *Pope & Talbot* as well.<sup>78</sup> It then concluded that the longshoreman's recovery against the shipowner must be reduced by the percentage of both his negligence and the stevedore-employer's negligence.<sup>79</sup> This conclusion, the court felt, was compelled by the language of § 905(b), which provides in relevant part that "[i]f such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to its vessel."<sup>80</sup> As all commentators acknowledge, even those advancing the Equitable Credit Doctrine,<sup>81</sup> the district judge's reasoning is erroneous. The language in § 905(b) relied upon by the court concerns only those cases in which the longshoreman is employed directly by the shipowner, and has no

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<sup>74</sup> Hence, in given situations, the longshoreman's recovery under the Equitable Credit Doctrine may well be lower than if he were permitted to sue the shipowner for his total damages regardless of the degree of the third party's fault in causing the injury. See Coleman & Daly, *supra* note 56, at 359.

<sup>75</sup> 1975 A.M.C. 362 (C.D. Cal. 1974).

<sup>76</sup> 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976).

<sup>77</sup> 1975 A.M.C. at 363-66.

<sup>78</sup> *Id.* at 366-69.

<sup>79</sup> *Id.* at 369-70.

<sup>80</sup> *Id.* at 370.

<sup>81</sup> See Coleman & Daly, *supra* note 56, at 388-89. Recognizing this error in *Shellman*, the commentators nevertheless concluded that "regardless of the intended meaning of that portion of *Shellman*, that language does nothing to undermine the viability of the *Shellman* credit." *Id.* at 389. This assertion is questionable since the district judge pronounced that his holding was "compelled" by the language of § 905(b), when in fact he had misinterpreted that provision.

significance whatsoever when the employee brings a third-party action against the vessel.<sup>82</sup> Nevertheless, the district court's holding established new precedent and constituted persuasive authority for the other district courts that also adhered to the Equitable Credit Doctrine.

Another district court case that favored the adoption of the *Shellman* rule was *Croshaw v. Koninklijke Nedlloyd B.V. Rijswijk*.<sup>83</sup> Although the judge conformed his ruling to the prevailing view in order to maintain uniformity within that district,<sup>84</sup> he concluded that the amendments contemplated the implementation of an equitable credit when the longshoreman's injury was caused by the concurring negligence of the shipowner and the stevedore-employer.<sup>85</sup> The inequity of the majority view was obvious: "If the stevedore were 90% negligent, the 10% negligence of the shipowner would be sufficient to cripple him with the entire judgment."<sup>86</sup> Furthermore, permitting the negligent stevedore-employer a lien upon the plaintiff's judgment to recover his compensation payments runs contrary to the principle that the stevedore-employer's right to reimbursement is equitable in nature. Accordingly, the stevedore-employer's lien must be reduced by the amount that his negligence diminished the longshoreman's recovery.<sup>87</sup>

The other district court decision which approved the Equitable Credit Doctrine was *Frasca v. Prudential Grace Lines, Inc.*<sup>88</sup> Although the court's holding was subsequently rendered moot by its entry of a judgment notwithstanding the verdict,<sup>89</sup> the court, in ruling

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<sup>82</sup> See Robertson, *Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 7 J. MAR. L. & COM. 447, 484 (1976).

<sup>83</sup> 398 F. Supp. 1224 (D. Ore. 1975).

<sup>84</sup> Because *Hubbard v. Great Pac. Shipping Co.*, 404 F. Supp. 1242 (D. Ore. 1975), was decided prior to *Croshaw*, the district judge felt obligated to maintain uniformity of law within that district. See 398 F. Supp. at 1231.

<sup>85</sup> 398 F. Supp. at 1231. Upon examining the 1972 amendments, the district judge acknowledged the difficulties present in construing them:

At first blush, then, the 1972 amendments seem to contain a "catch-22". Shipowners are not to be liable for negligence of the stevedore, the stevedore cannot be held liable for it either, but the injured plaintiff is entitled to damages for it. No explicit remedy for this paradox is provided by the Act.

*Id.* at 1232.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1233-34. In arriving at this conclusion, the court emphasized that the stevedore-employer's lien is equitable in nature. Affording the stevedore-employer such a lien when its negligence contributed to the longshoreman's injury "would clearly violate fundamental principles of equity." *Id.* at 1233. For further discussion of the nature of the employer's lien, see text accompanying notes 130-41 *infra*.

<sup>88</sup> 1975 A.M.C. 1143 (D. Md. 1975).

<sup>89</sup> 394 F. Supp. 1092 (D. Md. 1975).

from the bench after a jury verdict finding the stevedore-employer and shipowner concurrently negligent,<sup>90</sup> concluded that the *Shellman Rule* "can and will produce an equitable result in all circumstances."<sup>91</sup>

The common theme prevalent throughout the cases adopting the Equitable Credit Doctrine is the belief that the prevailing view imposes an unjustifiable burden upon the shipowner. Nevertheless, in order to reject the majority approach, these courts have been compelled to conclude that the 1972 amendments have modified the principles enunciated in *Halcyon* and *Pope & Talbot*. Whether this assertion misconstrues the amendments and their legislative history will be considered later in this section.

### C. *The Murray Credit Doctrine*

While the *Murray* Credit Doctrine<sup>92</sup> was adopted by the District of Columbia Circuit prior to the 1972 amendments, the concepts advanced by that doctrine still remain good law in that circuit, and hence are suitable for discussion in this portion of the article. In *Murray*, a government employee suffered injuries when an elevator malfunctioned in a building leased to the United States. The employee sued the building owner, Murray, who thereupon sought contribution and indemnity from the government.<sup>93</sup> The plaintiff, having received workmen's compensation from the government employer, was precluded by the Federal Employees' Compensation Act<sup>94</sup> from bringing an action against it. Because this remedy was exclusive, Judge Leventhal, writing for the court, concluded that the employer could not be a joint tortfeasor. Hence, since there was "no common liability between the employer and the third-party defendant sued in tort, the employer [could not] be forced to contribute to the other defendant."<sup>95</sup> Due to the fact, however, that the third party would have been entitled to contribution had the Act not been in effect, the court held that his liability to the plaintiff would be limited to one-half of the total amount of damages.<sup>96</sup> The court's conclusion was premised on the following principles:

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<sup>90</sup> The jury found that the stevedore-employer was fifty percent negligent, the shipowner forty percent negligent, and the longshoreman ten percent negligent in causing the injury. 1975 A.M.C. at 1143.

<sup>91</sup> *Id.* at 1144. Hence, the district judge reduced the \$21,000 judgment against the shipowner to \$8,000, which represented forty percent of the total damages. *Id.* at 1143.

<sup>92</sup> The doctrine derives its name from *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968).

<sup>93</sup> *Id.* at 1363.

<sup>94</sup> 5 U.S.C. ch. 81. (1970 & Supp. IV 1974).

<sup>95</sup> 405 F.2d at 1364.

<sup>96</sup> *Id.* at 1365-66 (citing *Martello v. Hawley*, 300 F.2d 721, 724 (D.C. Cir. 1962)).



Any inequity residing in the denial of contribution against the employer is mitigated if not eliminated by our rule . . . that where one joint tortfeasor causing injury compromises the claim, the other tortfeasor, though unable to obtain contribution because the settling tortfeasor had "bought his peace," is nonetheless protected by having his tort judgment reduced by one-half, on the theory that one-half of the claim was sold by the victim when he executed the settlement. In our situation if the building owner is held liable, the damages payable should be limited to one-half of the amount of damages sustained by plaintiff, assuming the facts would have entitled the owner to contribution from the employer if the statute had not interposed a bar. A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured employee is thus reduced in consequence of the employee's compensation act, but that act gave him assurance of compensation even in the absence of fault.<sup>97</sup>

The significance of the *Murray* case was magnified by a decision rendered by the D. C. Circuit four years later. In *Dawson v. Contractors Transport Corp.*,<sup>98</sup> the court expressly assumed the continuing validity of *Murray* and, more importantly, approved of its application to cases brought under the Longshoremen's and Harbor Workers' Compensation Act.<sup>99</sup> Although *Murray* has not been adopted outside of that circuit, and despite its drawbacks—which will be examined later in this article<sup>100</sup>—the fact remains that the Doctrine represents impressive authority which must be seriously considered in developing equitable uniformity under the 1972 amendments.

### III. THE NECESSITY FOR JUDICIAL RESTRAINT UNTIL CONGRESSIONAL OR SUPREME COURT REVIEW

The preceding section explored the different approaches that the

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<sup>97</sup> *Id.* (citations omitted). The logic of the *Murray* Credit Doctrine would seem to dictate that the concurrently negligent stevedore-employer's lien be diminished in relation to the extent that his fault caused the longshoreman's injury. Such an interpretation, however, would be contrary to the 1972 amendments. See text accompanying notes 147-50 *infra*.

<sup>98</sup> 467 F.2d 727 (D.C. Cir. 1972).

<sup>99</sup> *Id.* at 729-30 n.3. In approving the application of *Murray* to cases involving the Longshoremen's and Harbor Workers' Act, the court acknowledged that its holding in *Murray* was severely criticized by one of the district courts within that circuit. See *Turner v. Excavation Constr. Inc.*, 324 F. Supp. 704, 705 (D.D.C. 1971); note 148 *infra* & accompanying text.

<sup>100</sup> *Murray* has been criticized by a number of courts and commentators. See, e.g., *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 672 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976); *Shellman v. United States Lines, Inc.*, 1975 A.M.C. 363, 367-68 (C.D. Cal. 1974), *rev'd*, 528 F.2d 675, 680 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 764 (E.D. Pa. 1974); *Cohen & Dougherty*, *supra* note 20, at 605; *Coleman & Daly*, *supra* note 56, at 387-88; *Robertson*, *supra* note 82, at 482-83. For a discussion of some of the drawbacks to this doctrine, see note 148 *infra* & accompanying text.

federal district and appellate courts have adopted in their efforts to find a just solution to a troublesome problem. The following discussion will not examine which view is the most equitable one. Rather, because the two minority views have assumed that the 1972 amendments and more recent Supreme Court decisions have modified the principles enunciated in *Halcyon* and *Pope & Talbot*, the question must be raised whether such an assumption is correct. If it is indeed true, as the prevailing view asserts, that *Halcyon* and *Pope & Talbot* are still good law, then it is only for the Supreme Court or Congress, and not for the lower courts, to overrule those decisions.

In analyzing this issue, the first applicable Supreme Court ruling which should be considered is *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*<sup>101</sup> Although the contractual indemnity theory developed in *Ryan* is inconsistent with both the *Halcyon* no contribution rule and the *Pope & Talbot* no reduction of compensation payments concept, the fact remains that the *Ryan* Court did not overrule either of these cases. Instead, the Court distinguished *Halcyon*, noting that the considerations which led to that decision were not applicable in *Ryan*.<sup>102</sup> Hence, although *Halcyon* and *Pope & Talbot* lost much of their force after *Ryan*,<sup>103</sup> they nevertheless remained good law.

In a 1972 case the Court reaffirmed the principles enunciated in *Halcyon*. In *Atlantic Coast Line Railroad v. Erie Lackawanna Railroad*,<sup>104</sup> the district court dismissed the petitioner's complaint seeking contribution against the employer. The Supreme Court approved of the trial judge's ruling, holding that *Halcyon* was controlling.<sup>105</sup>

Two years later, in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*,<sup>106</sup> the Court held that contribution was permissible in a maritime noncollision case in which the stevedore was *not* the employer of the injured longshoreman. Unlike the employee in *Halcyon*, the longshoreman in *Cooper Stevedoring* could have proceeded against either the ship or the stevedore or both to recover his full damages. Finding no countervailing considerations, the Court concluded that "the well-established maritime rule allowing contribution between joint tortfeasors" should be applied to the instant situation.<sup>107</sup> The Court, how-

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<sup>101</sup> 350 U.S. 124 (1956). See text accompanying notes 30-32 *supra*.

<sup>102</sup> 350 U.S. at 133.

<sup>103</sup> See G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 443-44 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

<sup>104</sup> 406 U.S. 340 (1972).

<sup>105</sup> *Id.*

<sup>106</sup> 417 U.S. 106 (1974).

<sup>107</sup> *Id.* at 113. Hence, the crucial distinction between *Cooper Stevedoring* and *Halcyon* is that in the latter case the joint tortfeasor against whom contribution was sought was immune

ever, went to great length to distinguish *Halcyon*, stating that the principles advanced in that holding "still have much force."<sup>108</sup> In conclusion, the Court once again asserted that "our decision in *Halcyon* was, and still is, good law on its facts."<sup>109</sup>

Another recent holding that has been relied upon by those espousing the minority views<sup>110</sup> is *United States v. Reliable Transfer Co.*<sup>111</sup> In that case the Court overruled the century-old doctrine requiring property damage to be equally divided whenever two or more parties involved were at fault, regardless of the relative degree of each party's fault.<sup>112</sup> In promulgating a rule allocating liability for damages on the basis of proportional fault,<sup>113</sup> the Court adopted a principle that had been advanced by highly respected jurists and commentators.<sup>114</sup> But in adopting this equitable concept, the Court in no way

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from tort liability by statute (*i.e.*, the Longshoremen's and Harbor Workers' Compensation Act).

<sup>108</sup> *Id.* at 112. The Court also emphasized that its decision in *Atlantic Coast Line* was consistent with both *Halcyon* and the case it was presently deciding. *Id.* at 113-14.

<sup>109</sup> *Id.* at 115.

<sup>110</sup> See Coleman & Daly, *supra* note 56, at 364-65. The authors rely upon the following language in *Reliable Transfer*

[T]he Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." . . . No statutory or judicial precept precludes a change in the rule of divided damages, and indeed a proportional fault rule would simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established by Congress for personal injury cases.

*United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) (quoting *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963)) (citations omitted).

What Coleman and Daly fail to comprehend is that, as in *Cooper Stevedoring*, the Court did not have before it countervailing considerations. As stated by the court in *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 764 (E.D. Pa. 1974), "*absent considerations imposed by statutes such as the Longshoremen's and Harbor Workers' Compensation Act*, admiralty courts are relatively free to fashion appropriate rules of contribution based on fairness to the parties." (Emphasis added.)

<sup>111</sup> 421 U.S. 397 (1975).

<sup>112</sup> This rule was established by the Court in *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1854).

<sup>113</sup> 421 U.S. at 405. The Court stated:

It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice. An equal division of damages is a reasonably satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured and determined on a rational basis. The rule produces palpably unfair results in every other case.

<sup>114</sup> Dissenting in *National Bulk Carriers v. United States*, 183 F.2d 405 (2d Cir.), *cert. denied*, 340 U.S. 865 (1950), Judge Learned Hand, reflecting on the propriety of the divided damages rule, stated that this ancient and unjust rule "has been abrogated by nearly all civilized nations." *Id.* at 410. Remarking on this rule, Professors Gilmore and Black have stated: "This result hardly commends itself to the sense of justice any more appealingly than does the common law doctrine of contributory negligence." GILMORE & BLACK, *supra* note 103, at 528.

undermined the continuing validity of *Halcyon* and *Pope & Talbot*. It must be remembered that in these two cases there is present a countervailing consideration, the Longshoremen's and Harbor Workers' Compensation Act, which makes the stevedore-employer's liability of compensation payments exclusive. Unlike the circumstances of *Halcyon* and *Pope & Talbot*, the Court in *Reliable Transfer* was not confronted with the applicable provisions of the Act, and thus was able to fashion a rule based on proportional fault.<sup>115</sup>

It is apparent from the above discussion that no Supreme Court holding has overruled *Halcyon* or *Pope & Talbot*. The next inquiry is to determine whether the 1972 amendments have modified those decisions. In their excellent treatise, Gilmore and Black question whether the language contained in § 905(b) of the Act was meant to adopt the *Halcyon* rule.<sup>116</sup> The authors contend that if Congress had desired to adhere to the rule of no contribution, it could have inserted the following language: "The employer, even if his negligence has contributed to the injury, shall not be liable . . . ."<sup>117</sup> If Congress wanted the one-percent negligent shipowner to pay the longshoreman's full damages, Gilmore and Black argue, it could have indicated its intent more clearly.<sup>118</sup>

These assertions were considered recently by the Second Circuit.<sup>119</sup> After examining § 905(b), the court disagreed with Gilmore and Black, concluding that "[w]e see nothing in the statute to exclude [the adoption of the *Halcyon* rule]."<sup>120</sup> Indeed, it may be plausibly argued that if Congress desired to modify *Halcyon* and *Pope & Talbot*, it would have expressed this intent in clear terms. Thus, Congress could have provided in § 905(b):

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an

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<sup>115</sup> See note 110 *supra*.

<sup>116</sup> GILMORE & BLACK, *supra* note 103, at 451.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 452.

<sup>119</sup> *Landon v. Lief Hoegh & Co.*, 521 F.2d 756 (2nd Cir. 1975).

<sup>120</sup> *Id.* at 761 n.4. Upon examining the legislative history to the 1972 amendments, the Second Circuit arrived at a conclusion directly contrary to that asserted by Professors Gilmore and Black:

We read the emphasis "in whole or in part" [contained in [1972] U.S. CODE & AD. NEWS 4704-05] to mean to exclude liability by the employer to any extent including the amount of the compensation payments. If Congress had intended otherwise, it would simply have excluded employer liability for concurrent negligence "except to the extent of its compensation payments." We think it is significant that no such exception was made.

*Id.* at 763.

action against such vessel as a third party . . . and the vessel shall be liable for such injury only to the extent that its proportional negligence caused such injury . . . .

Congress, however, did not include this language. Hence, by not expressly modifying the *Halcyon* and *Pope & Talbot* rules when it had the opportunity to do so, the implication arises that Congress desired those rules to remain intact.

The language of § 905(b) is susceptible to a number of interpretations. In such a situation, it is not the role of the lower courts to construe the statute to overrule Supreme Court authority. Because of this lack of clarity, if § 905(b) by its terms is contrary to the principles enunciated in *Halcyon* and *Pope & Talbot*, then that interpretation should come only from the Supreme Court. Lower court intervention in this troublesome area can cause only further complications.

Given this sensitive problem, it is particularly disturbing to examine law review commentaries which severely criticize the decisions that uphold the validity of *Halcyon* and *Pope & Talbot*.<sup>121</sup> In promulgating their decisions, several of these courts expressed their dismay at the inequitable results which frequently occur.<sup>122</sup> Nevertheless, recognizing that it is only for Congress or the Supreme Court to modify *Halcyon* and *Pope & Talbot*, these lower courts have engaged in judicial restraint.<sup>123</sup> Such an approach is clearly correct. Judicial activism in this setting not only would undermine the authority of the Supreme Court and Congress but would also produce chaos throughout the judiciary, as each tribunal would be imposing its conception of fairness and justness upon the litigants.

Thus, in the absence of clear Supreme Court or Congressional guidance, the lower courts adhering to the continuing validity of

<sup>121</sup> See, e.g., Coleman & Daly, *supra* note 56, at 386-87 & 412-13.

<sup>122</sup> See, e.g., Santino v. Liberian Distance Transports, Inc., 405 F. Supp. 34, 35 (W.D. Wash. 1975), in which the district court acknowledged the inequitable results that frequently occur in these cases, and proposed the adoption of the following approach:

It would appear to this Court that a scheme might be devised to take care of the longshoreman who is injured by the concurring negligence of a shipowner and his own stevedore employer. Such a scheme could provide that an injured longshoreman might recover as against the negligent shipowner that percentage of his total damages which the shipowner's fault bore to the total fault and that he might in addition recover under the Act that percentage of his statutory benefits which the fault of his stevedore employer bore to the total fault. As against the negligent shipowner, the contributory negligence, if any, of the injured longshoreman would be taken into account.

In declining to adopt this approach, the court stated that under controlling authority it is for Congress and not the judiciary to remedy this situation. *Id.*

<sup>123</sup> See cases cited note 68 *supra*.

*Halcyon* and *Pope & Talbot* represent the correct view. But the question must be raised how the Supreme Court should resolve this dilemma. The next section of this article shall confront this difficult question.

#### IV. SUPREME COURT INTERPRETATION OF § 905(b): THE RECOMMENDED APPROACH

Due to the fact that Congress inartfully drafted § 905(b), the Supreme Court will have a difficult challenge in construing the statute to fulfill the congressional intent. But in interpreting this provision, the Court must remember that its job is not to act as a super-legislature.<sup>124</sup> Although members of the Court may feel that a certain construction would better serve the interests of justice, they must confine their analysis to the terms of the statute itself and its legislative history. In this manner the Court will be fulfilling the function which the American democratic system has assigned to it.<sup>125</sup>

This section of the article shall explore how the Supreme Court should resolve the issues that arise under § 905(b) when the longshoreman is injured by the concurrent negligence of the shipowner and his stevedore-employer. In particular, the relevant issues will be examined in the following order: (1) If the shipowner must pay damages to the injured longshoreman, does he have a right of contribution against the negligent stevedore-employer? (2) If the answer to (1) is no, then may the shipowner deduct from the amount of his damages the past compensation payments made by the stevedore-employer to the employee, (*i.e.*, will the employer's lien be diminished due to his concurrent negligence)? (3) Even though the stevedore-employer was concurrently negligent, is the longshoreman nevertheless entitled to recover his full damages from the negligent shipowner?

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<sup>124</sup> The Court does not function as a "super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

<sup>125</sup> As stated by Dean Griswold,

it is one thing to act according to one's personal predilections or choice, and a wholly different thing to come to one's own best conclusion in the light of his understanding of the law as it has been established by statute, decision, tradition, received ideals and standards, and all the other elements that go to make up our legal system . . . . The question is how far and how hard [the judge] seeks to be guided by an outside frame of reference, called for convenience "the law," in arriving at his conclusion, rather than focusing his intellectual effort, perhaps unawares, on justifying his conclusion arrived at somehow or other in some other way.

Griswold, *Forward: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 92 (1960).

### A. Contribution Between Stevedore and Vessel Owner

Upon examining the legislative history and the language of § 905(b), it becomes evident that contribution is prohibited by the Act. In pertinent part, that section provides: "[T]he employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." The legislative history also supports this conclusion:

[U]nless such hold-harmless, *indemnity or contribution agreements are prohibited* as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 [§ 905] of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.<sup>126</sup>

Thus the statute and its accompanying legislative history indicate that contribution as between the shipowner and stevedore-employer is strictly prohibited. The rationale underlying Congress' decision is clear. In return for increased compensation benefits paid to its injured employees regardless of fault, the stevedore-employer was relieved of any liability in third-party actions. At the same time, in order to provide an incentive for the shipowner to maintain a reasonably safe place for the employee to work, Congress introduced the concept of negligence in third-party actions.<sup>127</sup> But to guarantee that the economically more powerful shipowner<sup>128</sup> would not shift this liability to the stevedore-employer, an extra safeguard was devised. This safeguard explicitly provided in both the legislative history and the statute itself that the stevedore-employer was not to be liable to the shipowner *under any circumstances*. Hence, in return for imposing strict liability upon the employer by way of compensation payments, Congress made sure that he would be insulated from any liability to the vessel owner.<sup>129</sup>

<sup>126</sup> [1972] U.S. CODE CONG. & AD. NEWS 4704 (emphasis added).

<sup>127</sup> As stated in the House Report: "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work." *Id.*

<sup>128</sup> *Id.* See *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 671 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976); *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402, 408 (E.D. La. 1974); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 765-66 (E.D. Pa. 1974).

<sup>129</sup> See *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 767 (E.D. Pa. 1974):  
It was understood by the members of Congress most directly involved in amend-

### B. *Stevedore-Employer's Recovery of Compensation Payments*

A more difficult question is raised when one asks whether a negligent stevedore-employer should be entitled to recoup his compensation payments out of the longshoreman's third-party judgment. With respect to this issue, two different approaches have been recently advocated, both falling within the Equitable Credit Doctrine. The first is that the stevedore's lien should be reduced by the percentage of its negligence.<sup>130</sup> Under this approach, if the stevedore-employer was sixty percent negligent and his compensation payments totaled \$5,000, he would be entitled to a lien of \$2,000. The second approach provides that the stevedore-employer's lien should be diminished by the amount that his negligence reduced the longshoreman's third-party recovery. One limitation, however, is that the stevedore-employer's maximum liability cannot exceed the amount of its compensation payments.<sup>131</sup> Thus, if the longshoreman incurred \$10,000 damages caused by the sixty percent negligence of the employer and forty percent negligence of the shipowner, the shipowner would only be liable to the extent of his proportional fault, here \$4,000. Assuming that the employer has paid \$5,000 in compensation benefits, he would not be entitled to recover any of this amount. This results because the stevedore-employer's concurrent negligence diminished the employee's third-party judgment against the shipowner by \$6,000. The employer, however, does not have to pay an additional \$1,000 to the longshoreman for the reason that his maximum liability is limited to compensation payments.<sup>132</sup>

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ing the Act that in allowing for any third-party suits Congress ran the risk that liability would eventually be visited on the employer. It was deemed essential that clear amending language be used to prevent such an occurrence. The process by which a consensus was reached to allow for a third-party suit against the vessel for its negligence illustrates Congress' paramount concern that the employer's liability under the Act to his employee must be insulated and was intended to be insulated by the emphatic language of amended subsection 5(b), 33 U.S.C. § 905(b).

<sup>130</sup> See *Santino v. Liberian Distance Transports, Inc.*, 405 F. Supp. 34, 35 (W.D. Wash. 1975); Coleman & Daly, *supra* note 56, at 360 n.33, in which these commentators note:

One proposed approach to the Equitable Credit would alter the method of calculating the amount of lien repayment while still limiting a shipowner's liability to that portion of total damages which equals his proportionate fault. Instead of the Equitable Credit method of reducing the stevedore's lien recovery by the amount of third-party damages lost by the longshoreman due to stevedore negligence, the proposal would reduce the stevedore's lien in direct proportion to its negligence. Such an approach was thought to be even more equitable than the Equitable Credit, while far more appealing to stevedores and thus more likely to prevent tripartite litigation. However, it is doubtful whether it can achieve either goal.

<sup>131</sup> See Cohen & Dougherty, *supra* note 20, at 606-07; Coleman & Daly, *supra* note 56, at 355-59.

<sup>132</sup> See Coleman & Daly, *supra* note 56, at 356-59.



There is much equity to these approaches. The shipowner is not liable beyond the percentage of his proportional fault. In return for being absolutely liable for the longshoreman's injury, the stevedore-employer's maximum liability is limited to the amount of compensation payments. The employee, on the other hand, though no longer able to sue the shipowner for his full damages when the stevedore-employer is concurrently at fault, receives fairly generous compensation benefits even when there is no negligence or he is solely at fault in causing his injury.<sup>133</sup>

Thus a central premise underlying these approaches is that the stevedore-employer's right to recover his compensation payments is equitable in nature. As phrased by a federal district judge, "The stevedore's right of reimbursement, being equitable in nature, is subject to equitable regulation . . . . There is no equity in the principle that a stevedore should be allowed to enforce an unmitigated lien on a personal injury judgment which has been reduced because of the stevedore's concurrent negligence."<sup>134</sup> Such an assertion is undoubtedly correct. It indeed is inequitable for a stevedore-employer who contributorily caused the plaintiff's injuries to escape liability altogether. But this result, under the majority view, is exactly what transpires when the ninety percent negligence of the employer concurs with the ten percent negligence of the shipowner to cause the longshoreman's injury. The employer not only is absolved of liability to his injured employee but he recovers his compensation payments as well. This result hardly furthers the interests of justice.

There is, however, one major problem with the adoption of either of these Equitable Credit approaches. If the Supreme Court were to interpret the 1972 amendments according to one of these approaches, the Court would be contravening the clear intent of both

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<sup>133</sup> Advocating their support for the adoption of the Equitable Credit Doctrine, Coleman and Daly argue:

The Equitable Credit not only appears to be the fairest way of resolving the conflicting interests of longshoremen, stevedores, and shipowners, it also provides a reciprocal device to balance the stevedore's right to obtain recompense for its liability to an injured longshoreman directly from a negligent shipowner. Since a stevedore is entitled to file suit against a third-party shipowner to recover its lien when its liability is based, in whole or in part, on the shipowner's negligence, it is difficult to criticize a system which seeks to protect the shipowner from shouldering the entire liability when the loss was occasioned, in whole or in part, by the negligence of the stevedore. At the same time, the congressional design to limit the liability of stevedores to the extent of their compensation payments is accomplished.

*Id.* at 359-62.

<sup>134</sup> *Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, 398 F. Supp. 1224, 1234 (D. Ore. 1975) (citations omitted). Hence, "If [the employer's] lien is to be truly equitable, it must be diminished according to [his] negligence." *Id.*

the language of § 905(b) and its accompanying legislative history. That language provides unequivocally that the stevedore-employer shall not be liable to the shipowner *under any circumstances*. Hence, with respect to the employer, Congress made certain that his *sole* liability was that provided under the Act. In this manner,

Congress sought to eliminate *all* actions against the stevedore whether for indemnity or contribution, whether based on tort or on contract, and whether for fees and expenses. Allowance of any such actions, even a *pro tanto* recovery to the extent of payments made by the employer under the Act, would create the circuitous type action Congress considered was too costly and disruptive of the compensation scheme to be permitted.<sup>135</sup>

Those commentators advocating the adoption of the Equitable Credit Doctrine respond to the above analysis by arguing that denying the stevedore-employer his compensation lien "cannot be considered as contribution . . . ."<sup>136</sup> Such an assertion is patently incorrect. The incongruity of this argument becomes evident when one poses the following questions: (1) If the stevedore-employer's compensation lien is either diminished or denied altogether, does the result benefit the shipowner in that his liability to the longshoreman is reduced by this amount? (2) Would this amount otherwise be returned to the employer in the form of a lien upon the longshoreman's judgment against the third-party shipowner? The answer to both of these questions appears to be "yes."<sup>137</sup> As the Supreme Court recognized long ago in its *Pope & Talbot* decision, reduction or denial of the stevedore-employer's lien is merely another form of contribution which the Act expressly prohibits.<sup>138</sup> The 1972 amendments do not change this result. "Contribution is still prohibited and any indirect method to accomplish the same result is also prohibited."<sup>139</sup>

This conclusion is buttressed by the fact that § 933 contains specific provisions authorizing a negligent stevedore-employer to recoup its compensation payments out of any third-party recovery. Further, the almost unanimous view permits the employer, even though concurrently negligent, to recover his lien regardless of whether he has paid the compensation benefits under a formal award

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<sup>135</sup> *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 769 (E.D. Pa. 1974) (emphasis added).

<sup>136</sup> See *Coleman & Daly*, *supra* note 56, at 399.

<sup>137</sup> It can be argued, however, that the longshoreman should be allowed to keep both his compensation payments and his third-party recovery.

<sup>138</sup> 346 U.S. 406, 412 (1953).

<sup>139</sup> *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 679 n.2 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976).

or has made the payments without the entry of such an award.<sup>140</sup> The rationale underlying this approach is that Congress has sought to prohibit *any* attempt by the shipowner to shift liability to the stevedore-employer. To permit shipowner recovery, even to the extent of compensation payments, would once again plunge the federal courts into the circuitous type of actions which proved so disruptive. Thus, even though the stevedore-employer's lien may be an equitable one, in enacting the 1972 amendments Congress manifested its intent to provide the negligent employer with his compensation payments in full out of any third-party recovery.<sup>141</sup>

### C. Longshoreman's Recovery Against Negligent Shipowner

The last issue to be raised is whether the longshoreman should

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<sup>140</sup> Hence, the stevedore-employer's remedy under § 933 is not its exclusive remedy. As stated by the Supreme Court in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969):

When Congress imposed on the employer absolute liability for compensation, it explicitly made that liability exclusive. Yet in the same Act it attached no such exclusivity to the employer's action against third persons as subrogee to the rights of the employee or his representative.

. . . [W]e can perceive no reason why Congress would have intended so to curtail the stevedoring contractor's rights against the shipowner. . . . [T]his Court [never] . . . has held that statutory subrogation is the employer's exclusive remedy against third party wrongdoers, and we decline to so hold today.

As to whether the employer has a right to recover his compensation payments regardless of whether he has made these expenditures under an award, the leading case is *The Etna*, 138 F.2d 37, (3d Cir. 1943), in which the Third Circuit held:

We find no intent indicated by the Act to take away from the employer who pays compensation without an award his right to reimbursement out of his employee's recovery from third persons. On the contrary, we think that the intent and scheme of the Act requires that the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized wholly apart from and without regard for the assignment provided for in Sec. 33(b) of the Act. It is only the right of control of the employee's right of action against third persons which an employer foregoes by paying compensation without an award. *His right to reimbursement out of the recovery for the employee's injury remains unaffected.*

*Id.* at 41 (emphasis added). *Accord*, *Cella v. Partenreederei M.S. Ravenna*, 529 F.2d 15, 19 (1st Cir. 1975), *cert. denied*, 44 U.S.L.W. 3659 (1976); *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 673-74 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976); *Allen v. Texaco, Inc.*, 510 F.2d 977, 979-80 (5th Cir. 1975); *Louviere v. Shell Oil Company*, 509 F.2d 278, 283-84 (5th Cir. 1975); *Fontana v. Pennsylvania R.R.*, 106 F. Supp. 461, 462-63 (S.D. N.Y. 1952), *aff'd sub nom. Fontana v. Grace Line, Inc.*, 205 F.2d 151 (2d Cir.), *cert. denied*, 346 U.S. 886 (1953). As stated recently by the Fifth Circuit:

The subrogation right where there is no award is a judicial creature with the statute as a rationale. In cases such as this one, where the employee himself sues the third party tortfeasor, the courts have long recognized a right of subrogation to the extent of payments made, and have permitted the employer or its insurer to intervene in the employee's suit to protect its right, *even where the compensation was paid without the entry of a formal compensation award.*

510 F.2d at 979-80 (emphasis added).

<sup>141</sup> See *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 769 (E.D. Pa. 1974).

be entitled to recover his full damages against the concurrently negligent shipowner or whether the shipowner should be held liable only to the extent of his proportional fault. With respect to the proportional fault concept, there is language in the legislative history which supports this view. The House Report states: "The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore."<sup>142</sup> Some commentators argue that Congress inserted this language to ensure that the vessel owner would not be liable for more than his proportional part when the longshoreman's injury is caused by the concurrent negligence of the shipowner and the stevedore-employer.<sup>143</sup>

The difficulty with the above argument is that it is inapplicable when the longshoreman is suing the vessel due to the vessel's negligence. Hence, the House Report only concerns the situation in which the employee attempts to saddle the shipowner with the negligence of the employer. In order to protect the shipowner in such a situation, Congress expressly provided in the legislative history that the vessel cannot be liable for such negligence.<sup>144</sup> A far different case is presented, however, when the vessel is itself negligent. In this situation, the employee is seeking to recover on the basis that the shipowner breached his duty of due care toward the plaintiff. Under common-law negligence principles, it is immaterial insofar as the shipowner's liability is concerned that other parties may have negligently concurred in causing the injury. The plaintiff may proceed and obtain a judgment against any negligent defendant for his full damages.<sup>145</sup> Under the Act, however, the stevedore-employer cannot be sued for

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<sup>142</sup> [1972] U.S. CODE CONG. & AD. NEWS 4704.

<sup>143</sup> See Cohen & Dougherty, *supra* note 20, at 606-07; Coleman & Daly, *supra* note 56, at 372; Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act*, 41 INS. COUNSEL J. 63, 66 (1974). In his article, Vickery calls for the adoption of the *Murray* Credit Doctrine.

Since the new Act eliminates the shipowner's former action against the stevedore for breach of its warranty of workmanlike performance, which if established gave the shipowner complete indemnity for damages recovered by the plaintiff plus defensive attorneys fees and expenses, and since there has been "vast improvement in compensation benefits" (to use the words contained in the Committee report) it would appear that a strong argument can be made in favor of the applicability of the *Murray* credit.

41 INS. COUNSEL J., at 67.

<sup>144</sup> See [1972] U.S. CODE CONG. & AD. NEWS 4704. See generally Robertson, *supra* note 82, at 484-85.

<sup>145</sup> W. PROSSER, THE LAW OF TORTS 297 (4th ed. 1971):

[T]he common law developed a separate principle, that a tortfeasor might be liable for the entire loss sustained by the plaintiff, even though his act concurred or combined with that of another wrongdoer to produce the result—or, as the courts have put it, that the defendant is liable for all consequences proximately caused by his wrongful act.

negligence by the employee nor can he be liable to any third party to contribute for such an injury. Hence, invariably the injured longshoreman is left with only one party to sue under common-law negligence, that being the shipowner. Although this circumstance may leave the shipowner in an unenviable position, it must be emphasized that he is in no way being charged with the negligence of the stevedore-employer. As stated by one court, "This is simply a case of concurring negligence of the defendant-shipowner and the stevedore which, under a negligence theory, still entitles the plaintiff to a judgment against the defendant-shipowner in the full amount of his damages."<sup>146</sup>

Another incongruity with the proportional fault argument and the *Murray* Credit Doctrine as well is the anomalous result that occurs with respect to the stevedore-employer's right to its compensation lien upon the plaintiff's judgment in a successful third-party action. The logic of the *Murray* and Equitable Credit Doctrines dictates that the concurrently negligent stevedore-employer have his lien either diminished or denied in relation to the extent that his fault caused the longshoreman's injury. The 1972 amendments, however, mandate that the employer be reimbursed out of a third-party recovery for his full compensation payments.<sup>147</sup> Thus, if these doctrines

<sup>146</sup> *Hubbard v. Great Pac. Shipping Co.*, 404 F. Supp. 1242, 1244 (D. Ore. 1975). One of the key issues in a third-party action is what standard of negligence should be applied in a longshoreman's negligence action under § 905(b). Professors Gilmore and Black argue that the standards which have been developed in seamen's actions under the Jones Act should be applied. GILMORE & BLACK, *supra* note 103, at 452-55. Other commentators contend that the land standard of negligence is applicable. *See, e.g.*, Robertson, *supra* note 82, at 465-66.

The post-1972 decisions hold that the land standard is correct. *See Cummings v. "Siddharma" Soc.*, 409 F. Supp. 869, 871 (E.D. La. 1976); *Frasca v. Prudential-Grace Lines, Inc.*, 394 F. Supp. 1092, 1097 (D. Md. 1975); *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 413, 415 (E.D. La. 1975); *Anuszewski v. Dynamic Mariners Corp.*, 391 F. Supp. 1143, 1146 (D. Md. 1975); *Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 651 (N.D. Cal. 1974); *Citizen v. M/V Triton*, 384 F. Supp. 198, 202 (E.D. Tex. 1974). These decisions base their reasoning on the legislative history, which states:

The Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

[1972] U.S. CODE CONG. & AD. NEWS 4703.

<sup>147</sup> *See* section IV. B. *supra*.

were adopted, a longshoreman successful in a negligence action against the shipowner would have his recovery reduced either by one-half (*Murray* Credit) or by the proportion that the employer's negligence caused the injury (Equitable Credit), and also have an obligation to reimburse the employer out of his diminished recovery for all compensation benefits paid under the Act.<sup>148</sup> This result surely could not have been intended by Congress. Under this approach, when his injury was caused by the concurrent negligence of the shipowner and the stevedore-employer, the longshoreman would not have any incentive to bring a third-party action; more often than not in such a situation, the longshoreman's diminished recovery, rather than going into his own pocket, would go directly to his employer in reimbursement for past compensation benefits.

Another factor also militates against denying the longshoreman his full damages against the vessel owner. An important purpose underlying the 1972 amendments was to eliminate the circuitous type of actions which proved so costly to the litigants and so disruptive to the judicial process.<sup>149</sup> By holding the vessel liable only to the extent

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<sup>148</sup> See *Anthony v. Norfleet*, 330 F. Supp. 1211, 1214 (D.D.C. 1971); *Turner v. Excavation Constr., Inc.*, 324 F. Supp. 704, 705 (D.D.C. 1971). Both of these district courts criticized *Murray* for this very reason. Of course, the same rationale is equally applicable under the Equitable Credit Doctrine if the stevedore-employer is entitled to recover its full compensation payments.

The *Murray* Credit Doctrine also has been criticized as being inequitable. The doctrine only accomplishes a fair result when the stevedore-employer's negligence is fifty percent, the compensation payments constitute fifty percent of the total damages sustained by the longshoreman, and the stevedore-employer is not entitled to recover his payments. Otherwise, "to apportion on an arbitrary 50 percent divided damages basis (the 'Murray credit') is inequitable because the actual faults may not be in that proportion." *Cohen & Dougherty, supra* note 20, at 605. See *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 672 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976); *Shellman v. United States Lines, Inc.*, 1975 A.M.C. 362, 368 (C.D. Cal. 1974), *rev'd*, 528 F.2d 675, 680 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (1976); *Coleman & Daly, supra* note 56, at 387-88; *Robertson, supra* note 82, at 482-83.

<sup>149</sup> See [1972] U.S. CODE CONG. & AD. NEWS 4702-03:

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

of its proportional fault, the degree of the stevedore-employer's negligence once again becomes a critical factor. And, of course, the percentage of the employer's negligence cannot be determined without it being in court and represented by counsel. Thus, once the shipowner's extent of liability turns on whether the stevedore-employer was concurrently negligent, many of the evils which Congress sought to eliminate by the 1972 amendments reappear: (1) The shipowner, hoping to reduce or eliminate the extent of his liability, attempts to show that the accident occurred primarily because of the stevedore-employer's negligence; (2) the stevedore-employer, recognizing that any reduction in the longshoreman's recovery may diminish its lien for past compensation benefits, has a direct financial stake in showing that the shipowner's negligence was solely responsible for the longshoreman's injury; (3) the longshoreman, realizing that the amount of his recovery is directly related to the extent of the shipowner's negligence, exerts all efforts to prove that his injury was caused solely by the vessel's fault. The end result is the identical situation that Congress expressly sought to eliminate. To interpret the amendments, particularly § 905(b), to frustrate this overriding purpose would represent judicial legislation in the face of congressional mandate. Congress has expressed its intent and the judiciary's obligation is to ensure that this intent is furthered rather than nullified.

Additionally, it must be remembered that denying the longshoreman the full amount of his damages against the negligent shipowner would not eliminate inequity. Such an approach would simply shift the inequity from the vessel owner to the injured plaintiff. As stated by one court: "He would be restricted in his recovery as against the shipowner without acquiring any offsetting rights under the Act as against the stevedore employer."<sup>150</sup> Also, to shift the inequitable burden from the financially stronger to the weaker party runs counter to fundamental interests of fair play. The amount that the shipowner pays to the injured employee can be passed easily onto the public as a cost of transacting business. Advocating the implementation of strict liability against manufacturers of defective products, Mr. Chief Justice Traynor articulated several arguments that are relevant to the present situation:

Some two decades ago it seemed to me more forthright, in a concurring opinion in *Escola v. Coca-Cola Bottling Company*,<sup>[151]</sup> to fix liability upon the one best able to anticipate and bear the risks of injury from defective products. "Those who suffer injury from

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<sup>150</sup> *Santino v. Liberian Distance Transports, Inc.*, 405 F. Supp. 34, 35 (W.D. Wash. 1975).

<sup>151</sup> 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

defective products are unprepared to meet its consequences. The cost of injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of the injury can be insured by the manufacturer and distributed among the public as a cost of doing business. . . . However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best suited to afford such protection."<sup>152</sup>

The position advanced by Chief Justice Traynor promotes, rather than retards, the interests of a humane society.<sup>153</sup> But, unlike

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<sup>152</sup> Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366 (1965) (quoting 24 Cal. 2d at 462, 150 P.2d at 441). Chief Justice Traynor, a strong advocate for judicial action, has urged his fellow jurists to engage in judicial creativity and boldness:

[T]he real concern is not the remote possibility of too many creative opinions but their continuing scarcity. The growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a judicial lethargy that masks itself as judicial dignity . . . .

LEGAL INSTITUTIONS TODAY AND TOMORROW 52 (M. Paulsen ed. 1959). See also Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U.L. REV. 401, 424 (1968).

<sup>153</sup> On other occasions, the Court engaged in judicial activism in order to ensure that the employee received adequate benefits when he became disabled or injured. The *Sieracki* decision no doubt was prompted by this humanitarian consideration. See Comment, *The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. MIAMI L. REV. 94, 99 (1972); Comment, *Negligence Standards Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints*, 21 VILL. L. REV. 244, 247 (1976).

Another area of law in which the Court played the role of the legislature was in its decisions under the Federal Employers' Liability Act, 45 U.S.C. § 51 (1970). In construing the statute, the Court originally required a worker to show employer negligence, including most of the common-law elements, in order to win his lawsuit. See *Atchison T. & S.F. Ry. v. Saxon*, 284 U.S. 458 (1932); *New York Cent. R.R. v. Ambrose*, 280 U.S. 486 (1930); *Western & Atl. R.R. v. Hughes*, 278 U.S. 496 (1929). Subsequently the Court reevaluated its approach and interpreted the statute favorably toward the employee. See *Gallick v. Baltimore & O.R.R.*, 372 U.S. 108 (1963); *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326 (1958); *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957). Dissenting in *Bailey v. Central Vt. Ry.*, 319 U.S. 350 (1943), Justice Roberts, joined by Justice Frankfurter, criticized the Court for its activist policy:

I cannot concur in the intimation . . . that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault. I yield to none in my belief in the wisdom and equity of workmen's compensation laws, but I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy, but, instead, had adopted the common law doctrine of negligence.

*Id.* at 358 (Roberts, J., dissenting). Reflecting on this activist trend, a federal circuit judge stated that the Supreme Court had in all practicality "converted this negligence statute into a compensation law thereby making . . . a railroad an insurer of its employees." *Griswold v. Gardner*, 155 F.2d 333, 334 (7th Cir. 1946). For law review articles discussing the Supreme



the *Escola* situation, the judiciary in achieving this goal need not engage in judicial activism. As discussed earlier in this section, Congress has determined that the shipowner must bear the longshoreman's full damages even though the stevedore-employer was concurrently negligent. Hence, judicial activism in this setting would not only frustrate the congressional purpose of the Act but would also be contrary to the fundamental interests of justice.

## V. CONCLUSION

Upon examining the relevant authorities with respect to the problems raised when the longshoreman's injury is caused by the concurrent negligence of the shipowner and stevedore-employer, one is immediately struck by the incongruity between the views espoused and the parties who espouse them. First, many of the professional law review articles appear to have been written by attorneys who represent primarily shipowner interests. Second, there appears to be a noticeable lack of professional works that support the longshoreman's interests. The incongruity arises when one recognizes that these pro-business as opposed to labor groups traditionally have tended to advocate judicial restraint rather than activism. The rationale underlying this approach is clear: judicial activism has historically represented a trend toward greater employee recovery at the cost of the employer or third party.<sup>154</sup> Under the 1972 amendments, however, the implementation of an activist approach by the courts would signify more favorable treatment for the shipowner. Hence, the party who would ordinarily argue that restraint is the proper role for the judiciary is now asserting, of course employing other terms, that only judicial activism can cure the ills created by Congress.

In all due respect to these commentators, judicial restraint and not activism is the proper solution to the problem posed by the 1972 amendments. This approach may lead to injustices on certain occasions, but Congress, and not the judiciary, enacted the amendments. Further, it must be emphasized that although judicial activism may at times be proper, the issues present in this area involve complex

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Court's activist approach in construing the Federal Employers' Liability Act, see Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 97 n.29 (1959); Richter & Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L.Q. 203 (1951); Steinberg, *The Federal Employers' Liability Act and Judicial Activism: Policymaking by the Courts*, 12 WILLAMETTE L.J. 79 (1975); Comment, *The Federal Employers' Liability Act—A Plea for Reform*, 14 ST. LOUIS U.L.J. 112 (1969); Comment, *Federal Employers' Liability Act—Certiorari Practice—Review of the Sufficiency of Evidence*, 6 VILL. L. REV. 549 (1961).

<sup>154</sup> See note 153 *supra*.

policymaking decisions. Judicial interference can only complicate an already confusing situation. If statutory modification of the 1972 amendments is necessary, this task should be accomplished by the legislature.